89-792

No.

Supreme Court, U.S.
FILED
NOV 14 1989
JOSEPH F. SPANIOL, JR.
CLERK

In the

Supreme Court of the United States

October Term, 1989

OLYMPIA BREWING COMPANY,

Petitioner,

vs.

LOUIS P. SINGER, As Successor in Interest to Troster, Singer & Co.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Hill, Farrer & Burrill
William M. Bitting
Counsel of Record
Dean E. Dennis
Attorneys for Petitioner
445 South Figueroa
35th Floor
Los Angeles, California 90071
(213) 620-0460

QUESTION PRESENTED

Does the integrity of the *scienter* requirement in an implied private right of action under Rule 10b-5 require limitation on the permissible inferences which may be drawn when the evidence offered to support an intent to defraud can equally support a legitimate or wrongful motive? Would the limitation on inferences this Court has adopted in antitrust cases offer the necessary protection?

LIST OF PARTIES AND RULE 28.1 LIST

The parties below were the petitioner, Olympia Brewing Company, and the respondent, Louis P. Singer, as successor in interest to Troster, Singer & Co.

Olympia Brewing Company is now owned by Pabst Brewing Company. The parent of Pabst Brewing Company is S & P Company. Olympia Brewing Company is affiliated with Falstaff Brewing Company, Pearl Brewing Company and General Brewing Company.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

OLYMPIA BREWING COMPANY,

Petitioner,

vs.

LOUIS P. SINGER, As Successor in Interest to Troster, Singer & Co.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner, Olympia Brewing Company, prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Second Circuit, affirming the decision of the United States District Court for the Eastern District of New York.

OPINIONS BELOW

The August 16, 1989 denial of Olympia's Petition for Rehearing containing a suggestion that the action be reheard in banc appears in the Appendix at A-1. The opinion of the Court of Appeals, reported at 878 F.2d 596, is reproduced in the Appendix at A-2. The Order of the District Court denying Olympia's motion for judgment notwithstanding the verdict, etc. appears in the Appendix at A-12. The District Court's Memorandum and Order denying Olympia's motion for a directed verdict appears in the Appendix at A-13.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was filed June 28, 1989, affirming the District Court's orders dated January 27, 1988 and March 25, 1988 which denied petitioner's motions to set aside the verdict, for judgment notwithstanding the verdict, for a new trial and a partial trial. The Court of Appeals denied a timely petition for rehearing August 16, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

The jurisdiction of the district court was invoked under 28 U.S.C. §§ 1331(a) and 1332(a)(1).

QUESTION PRESENTED

This Petition questions whether or not the broad range of inferences which are available to a plaintiff in an implied private right of action under Securities Exchange Commission Rule 10b-5 hasn't unravelled the presumptions and defenses created by Congress in the Securities Act of 1933 and the Securities Exchange Act of 1934.[1] The petition urges the importation of

---

[1] The Court has previously addressed various positive and common law requirements for a violation of § 10(b) or of Rule 10b-5. *See, e.g., Santa Fe Industries, Inc. v. Green*, 430 U.S. 462, 97 S.Ct. 1292, 51 L.Ed.2d 480 (1977) ("manipulative or deceptive requirement of the statute"); *Dirks v. S.E.C.*, 463 U.S. 646, 103 S.Ct. 3255, 77 L.Ed.2d 911 (1983) (duty to disclose); *Chiarella v. United States*, 445 U.S. 222, 100 S.Ct. 1108, 63 L.Ed.2d 348 (1980) (same); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 96 S.Ct. 1375, 47 L.Ed.2d 668 (1976) (*scienter*); *Basic Incorporated v. Levinson*, 485 U.S. 224, 108 S.Ct. 978, 99 L.Ed.2d 194 (1988) (materiality).

this Court's limitations on inferences in antitrust cases into securities cases to avoid the type of abuse that led to the result in this case and deterred intervention by the courts below.[3]

By drawing inferences of nefarious motives from otherwise proper conduct, the jury in this 10b-5 case concluded that Olympia Brewing Company ("Olympia") acted with the requisite intent to defraud. The jury drew this conclusion even though the supposed misleading statement by Olympia was not made until *after* Olympia had informed the Enforcement Division of the Securities Exchange Commission ("SEC") of the suspected wrongdoing. There is no rational way to explain how Olympia could have intended to deceive investors *after* it had disclosed what it knew to the SEC. Neither is there any suggestion that Olympia benefited from the alleged fraud. The Courts below, however, justified the verdict with the standard "province of the jury" approbation. In a 10b-5 private right of action, a clearer evidentiary standard is necessary to permit a court to grant summary judgment or take the case from the jury on directed verdict.

This Court has established the burden of proof in a 10b-5 action as "preponderance of the evidence" [*Herman & MacLean v. Huddleston*, 459 U.S. 375, 103 S.Ct. 683, 74 L.Ed.2d 548 (1983)], but has also emphasized the serious Congressional policy of requiring a plaintiff to prove intent which is expressed in the securities acts. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 96 S.Ct. 1375, 47 L.Ed.2d 668 (1976). Petitioner herein argues for a threshold requirement in the burden of proof to limit the range of permissible inference drawing from highly ambiguous evidence. Such a requirement would accord with this Court's similar restrictive approach to inferences in antitrust law. *Matsushita Electrical Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). Judge Easterbrook

---

[3] Because of the existing deferential approach to jury fact-finding based upon wide ranging inferences, the Court of Appeal devoted only one page of its opinion to this substantive issue.

has touched on this issue in his Seventh Circuit opinion, *Barker v. Henderson, Franklin, Starnes & Holt*, 797 F.2d 490, 497 (7th Cir. 1986). The specific question presented is therefore:

> Does the integrity of the *scienter* requirement in an implied private right of action under Rule 10b-5 require a limitation on the permissible inferences which may be drawn when the evidence offered to support an intent to defraud can equally support a legitimate or wrongful motive? Would the limitation on inferences this Court has adopted in antitrust cases offer the necessary protection?[3]

STATUTORY PROVISIONS INVOLVED

The following statutes are set forth in pertinent part in the Appendix at A-20.

> Section 10 of the Securities Exchange Act of 1934, 15 U.S.C. 78j;
>
> Rule 10b 5, 17 C.F.R. § 240.10b-5.

---

[3] This Court may, of necessity, need to decide two issues heretofore reserved:

1. Whether a private right of action exists for aiding and abetting a 10b-5 violation [reserved in *Herman & MacLean v. Huddleston*, 459 U.S. at 379 n.5, 103 S.Ct. 685 n. 5, *Ernst & Ernst v. Hochfelder*, 425 U.S. at 191-192 n. 7, 96 S.Ct. at 1380 n.7]. Olympia was held liable herein under both a primary fraud and aiding and abetting theory. *Scienter* is a requirement under either theory. *Schlifke v. Seafirst Corp.*, 866 F.2d 935 (7th Cir. 1989).

2. Whether "recklessness" will satisfy the intent to defraud requirement [reserved in *Ernst & Ernst v. Hochfelder*, 425 U.S. at 192-193 n.12, 96 S.Ct. at 1381 n.12]. The jury herein was instructed on recklessness in accordance with Second Circuit law [*Decker v. Massey-Ferguson, Ltd.*, 681 F.2d 111, 120 (2d Cir. 1982). Most other circuits are in accord [See discussion and citations, *infra*, at p. 18].

STATEMENT OF THE CASE

A. *Nature of the Case*

Respondent Louis P. Singer ("Singer") as successor to Troster-Singer & Co. ("TSCO") challenged the completeness of a public statement made by Olympia to *Barron's* on March 4, 1977.* That statement concerned false rumors of an imminent takeover of Olympia. The rumors were being generated by an unconnected third party, R. Jack Bernhardt ("Bernhardt"), a registered representative and securities salesman of Loeb-Rhoades & Co. ("Loeb-Rhoades"), who was manipulating the market and caused an artificial increase in the price of Olympia stock. Although plaintiff was unable to show that Olympia received any benefit from the alleged omissions in its public disclosure, Singer claims the disclosure didn't go far enough. He maintains that Olympia knew of Bernhardt's fraud and was legally compelled to publicize its purported knowledge in the *Barron's* interview of James Senna, an Olympia Vice-President.

As the price of Olympia stock fell dramatically in response to the generally negative article in *Barron's*, on March 7, 1977, TSCO, a market-maker in Olympia, accumulated a huge "long" position in the stock. When the stock did not rebound, TSCO suffered substantial trading losses on its purchases. Singer argues that had Olympia disclosed Bernhardt's manipulation to *Barron's*, he would have ceased to make a market in the stock before the stock's sharp decline. Singer contends that Olympia's conduct rises to the level of a 10b-5 securities violation because it withheld such information for its selfish gain.

---

* Singer also challenged the completeness of Olympia's disclosures in two company press releases on March 13 and 15, 1977. These releases were simply not material to the purported fraud as they occurred after the sharp decline in the stock and TSCO's head trader Frederick Rittereiser testified they "came too late" to make a material difference to TSCO's trading decisions (JA 210-211). The alleged misrepresentations or omissions of Olympia were thus reduced to one: the *Barron's* interview.

However, the purported omissions from Olympia's public statement occurred *after* Olympia's counsel, Joseph Flom, notified Stanley Sporkin at the SEC of the rumors and Bernhardt's unusual trading. Singer's repeated suggestions of Olympia's possible selfish "motives" in withholding information from the market are devoid of any evidence to show intentional or reckless conduct. Olympia's decision to inform the SEC and follow its directions is wholly inconsistent with Singer's contentions that Olympia subsequently concealed facts from the public for its own gain.[5]

B. *Background and Facts Related to Olympia's Expansion*

Olympia brewed and distributed beer, primarily in the northwestern United States (JA 1055).[6] The brewing industry in the 1970s was in a pattern of rapid consolidation, and Olympia faced the choice of either expanding beyond the Pacific Northwest or being acquired by one of the national brewers (JA 776-777). Olympia was looking for opportunities to expand while aware of rumors that itself was a potential takeover target (JA 779).

---

[5] The case was tried before a jury. The trial court twice reserved ruling on Olympia's motions for directed verdict (JA 915, 916, 1062). The jury returned a verdict which awarded $1,354,592.50 on both the primary fraud and aiding and abetting claims. The trial judge added $1,603,758 in prejudgment interest for a total judgment of $2,958,350.50. (JA 1159-1161).

Following the verdict, Olympia renewed its motion for directed verdict, which was denied by Memorandum and Order, January 27, 1988 (JA 1663). Olympia moved, alternatively, for judgment notwithstanding the verdict, for a new trial, and for relief from the judgment under Rule 60(b)(6). The latter motion sought an offset against the judgment based upon a $1,250,000 settlement Singer had received from Loeb-Rhoades. By Order dated March 25, 1988, the Court denied each of these motions except that for an offset, which was reserved (JA 1688). By Memorandum and Order filed July 12, 1988, the Court awarded Olympia an offset against the judgment in the amount of $1,250,000 (JA 1690). This offset was affirmed by the Second Circuit.

[6] References throughout this Petition are to page numbers in the Joint Appendix (JA) in the Court of Appeals or to trial exhibits (Exh.).

In August 1976, Olympia announced the stock-for-stock acquisition of the Lone Star Brewing Company of San Antonio, Texas (JA 786). The Lone Star shareholders approved the transaction in late December 1976 with every 3.75 shares of Lone Star being exchanged for one share of Olympia (JA 786, 791).

The Lone Star deal created the need at Olympia for an investment banker, causing Olympia to retain the William Sword Company (JA 932). On Sword's advice, Olympia hired Joseph Flom of the law firm of Skadden Arps Slate Meagher & Flom (JA 986). Olympia also retained Georgeson & Company, a shareholder relations firm, to assist with proxy solicitations and to monitor SEC 13d filings as an alert to a takeover (JA 787-788).[7]

Following the Lone Star acquisition, the Sword Company continued to evaluate financial options for Olympia. Olympia stock had risen steadily in 1976, and the price-earnings ratio of Olympia was one of the highest in the industry (Exhs. 16, 17, JA 1245, 1247). On January 3 and 4, 1977, James Senna, Olympia's Vice-President of Finance, met with Barrie Goodman, a Sword employee, to consider financial options for Olympia, including acquisitions, a stock split, or a listing on the New York Stock Exchange (JA 933-934; Exhs. 16, 140, 144, 145, JA 1245, 1617, 1641, 1643). The same subjects remained a source of discussion at Sword throughout January, 1977 (Exhs. 17, 144, 145, JA 1247, 1641, 1643). Despite consideration of these options, Olympia did not split its stock, did not increase the number of its authorized shares, did not issue a new class of stock, did not increase its dividend, and did not acquire any additional companies using its stock (JA 734-735, 1009).

[7] Pursuant to SEC Rule 13d, persons acquiring more than five percent (5%) of certain equity securities must meet detailed disclosure requirements. Whether or not Bernhardt had violated Rule 13d by acquiring more than five percent (5%) of Olympia's stock, and was thus organizing a hostile takeover, became a major concern of Olympia management in early 1977.

C. *Olympia's Purported Knowledge of Bernhardt's Fraud*

We know from Bernhardt's own admissions in his testimony and the testimony of plaintiff's expert, Norman Poser, that Bernhardt manipulated the market for Olympia stock causing an artificial rise in its price (JA 238-331, 306-458, 680-689, 646-670). The parties did not contest this fact at trial.

From January through March 6, Olympia stock experienced a 9 point increase (Exhs. 137, 138, JA 1599, 1602). On March 6, 1977, the negative article in *Barron's* sent the stock into a decline from which it never recovered (Exhs. 137, 138, 149, JA 1599, 1602, 1647). During this January to March period, rumors circulated almost daily that a company would attempt a takeover of Olympia. These rumors caused Olympia to begin an investigation.

At the end of the investigation on March 3, 1977, Olympia went to the SEC and disclosed what it had discovered. Singer contended at trial that Olympia knew of Bernhardt's conduct weeks earlier. Olympia showed that it had no hard evidence of wrongdoing — only suspicion — and took that information to the SEC. The SEC commenced an investigation which resulted in a two week trading halt in Olympia stock beginning March 14 and eventually resulted in the arrest and conviction of Bernhardt. The SEC never investigated Olympia.

On Friday, March 4, 1977, the day after the SEC disclosure, Senna responded to a telephone interview by *Barron's*. This resulted in the negative article the following Monday which caused the stock to drop.[8]

---

[8] Until March 4, 1977, Olympia had made no public statement concerning these matters. Although Singer argued Olympia had a duty to speak earlier, the Court below properly instructed the jury that liability could only be based on Olympia's actual statements. There was no duty to disclose prior to the time Olympia chose to speak: Olympia was not responsible for the rumors leaking into the market nor was it trading in its own stock. *State Teachers' Retirement Board v. Fluor Corp.*, 654 F.2d 843, 850 (2d Cir. 1981).

D. *Detailing Olympia's Private Disclosure to the SEC*

On March 3, 1977, Olympia decided to have Flom notify the SEC (JA 840-842). Flom called Stanley Sporkin at the SEC and told him all the facts as he knew them (JA 995). Specifically, Flom reviewed with Sporkin a meeting which Olympia had conducted with Loeb-Rhoades on February 9, 1977 wherein Loeb-Rhoades had denied any involvement in a takeover. Flom also told Sporkin about subsequent developments, in particular, the fact that Bernhardt had left his employment at Loeb-Rhoades and gone to another brokerage house, Swift Henke. Flom told Sporkin that Bernhardt's rumor activity had started up again at Swift Henke. Flom reviewed with Sporkin the high multiples of the stock and his concern about the high trading volume, and, on Sporkin's recommendation, agreed that Olympia would voluntarily suspend trading if the SEC requested it (Exh. BE, JA 1659). Sporkin said he would get right on the investigation (JA 995; Exh. BE, JA 1659).

E. *Detailing Olympia's Voluntary Public Disclosure*

On March 4, 1977, Steve Anreder of *Barron's* contacted Jim Senna and asked about rumors of a takeover, specifically a rumor that Olympia would be sold when the stock reached $80 a share (Exh. 42, JA 1328). Senna told him that Olympia had heard the rumors, but that Olympia was not for sale (Exh. 42, JA 1328). Senna also discussed the pricing of Olympia, analyzed 1976 earnings, and confirmed that Olympia's goal was to reach national distribution (Exh. 42, JA 1328). On March 7, 1988, a generally negative article concerning Olympia appeared in *Barron's*, and Olympia's stock dropped $10 a share that day to $50 a share (Exh. 137, JA 1599). The article pointed out that Olympia stock was overpriced compared to other prominent competitors particularly with respect to its price earnings ratio. The article concluded:

> Finally, as we understand it, there have been rumors that Olympia will be bought out at $80 a share. Steve put that one squarely to the company. Man said, yes,

> he's heard the rumors. But, no, Olympia is not for sale. (Exh. 149, JA 1647).

That was the complete statement for which Olympia was held liable.

F. *Facts Related to Alleged Motives*

Singer contends that Olympia did not disclose the facts it knew about Bernhardt's fraud because Olympia wanted to keep the price of the stock high for several reasons:

First, Singer suggests that Olympia withheld information to keep the price of the stock high so it could make acquisitions, including the acquisition of All Brands Importers, Inc. (JA 1083). Undoubtedly, Olympia's goal in 1976 was to become competitive in the national market, and acquisitions were one option in that strategy (JA 776-791). However, from December 1976 and throughout 1977, no negotiations took place between Olympia and any other company in which stock would be used to acquire that company (JA 1009). Olympia looked into the possibility of acquiring the relatively small All Brands for cash: there was no discussion of a stock acquisition, which would have cost almost as much administratively as All Brands was worth (JA 1012). After receiving a McKinsey & Company study of All Brands on February 22, 1977, Olympia immediately decided not to pursue an acquisition (JA 596, 1010). By the time of the alleged deception, the All Brands idea had been dropped. In 1977, Olympia made no acquisitions using stock or otherwise (JA 1014).

Second, Singer argues that Olympia was trying to maintain the price of an artificially high stock to avoid financial disaster for members of the Schmidt family (JA 1084). The Schmidt family held some 800,000 shares of Olympia stock and controlling interest in the company and lost close to $32,000,000 in the decline (JA 773). Before March 16, 1977, no family member inside or outside the company sold any stock at the artificially high prices (Exh. 62, JA 1336). After March 16, 1977, when the

stock had already dropped 30 points, Olympia imposed a trading ban on inside family members (Exh. 147, JA 1646).

Singer also argues that Olympia desired to keep the price of its stock high to complete the exchange of Lone Star shares for Olympia shares without being sued by a Lone Star shareholder (JA 1083-1084). Olympia announced the merger with Lone Star in August, 1976, and the Lone Star shareholders approved the deal on December 28, 1976 (JA 786, 791). The ministerial exchange of Lone Star shares for Olympia shares through Olympia's transfer agent, Seattle First National Bank, was all that remained to be completed (JA 717, Exh. 120, JA 1588). In support of its motive, Singer offered Exh. 120, a handwritten note by an Olympia banker, Joseph Self, indicating that "problem accentuated by Seafirst delay in exchange. . . ." (Exh. 120, JA 1588). Self testified that he wrote this undated memo shortly before the press release on March 14, 1977 (JA 717-720). Self and Goodman testified that the "problem" may have been related to the issuance of a press release (JA 509, 716).

REASONS FOR GRANTING THE WRIT

I. Allowing Inferences from Highly Ambiguous Evidence Does Not Adequately Protect the Policy Enunciated in *Hochfelder* That Intent to Defraud Be Proven

To constitute a violation of Rule 10b-5, there must be fraud. *Ernst & Ernst v. Hochfelder*, 425 U.S. at 197-199, 96 S.Ct. at 1383-1384 (statutory words "manipulative" or "deceptive" used in conjunction with "device" and "contrivance" strongly suggest that § 10(b) was intended to proscribe knowing or intentional misconduct). *See Dirks v. S.E.C.*, 463 U.S. 646, 666 n.27, 103 S.Ct. 3255, 3268 n.27 (1983). *Scienter*, "a mental state embracing intent to deceive, manipulate or defraud" [*Hochfelder*, 425 U.S. at 193, 194 n.12, 96 S.Ct. at 1381 n.12] is an independent element of a Rule 10b-5 violation. *Dirks*, 463 U.S. at 663 n.23, 103 S.Ct. at 3266 n.23. This Court has not yet defined the minimum element of *scienter* necessary to support a 10b-5 complaint, but it has noted that negligence by Olympia would not be enough:

> When a statute speaks so specifically in terms of manipulation and deception, and of implementing devices and contrivances — the commonly understood terminology of intentional wrongdoing — and when history reflects no more expansive intent, we are quite unwilling to extend the scope of the statute to negligent conduct. *Hochfelder*, 425 U.S. at 214, 96 S.Ct. at 1391.

The requirement of proof of intent for a private right of action under Rule 10b-5 ensures the integrity of §§ 11, 12, 15, and 20 of the Securities Act of 1934, which sections establish liability without fault for a limited group of people. *Hochfelder*, 425 U.S. at 208-210; 96 S.Ct. at 1388-1389. *Herman & MacLean*, 459 U.S. at 382-385, 103 S.Ct. at 687-689. Implied rights of action may cover a larger group, but there must be proof of fault and intent. *Barker v. Henderson, etc.*, 797 F.2d at 495.

> No one may be held liable without proof that he acted with *scienter*; otherwise the premise of *Herman & MacLean* would not be satisfied. *See also IIT v. Cornfeld*, 619 F.2d 909, 923 (2d Cir. 1980) (Friendly, J.); *SEC v. Arthur Young & Co.*, 590 F.2d 785 (9th Cir. 1979). *Barker v. Henderson, etc.*, 797 F.2d at 495.

Where, as here, there is no direct evidence of intent to defraud, the plaintiff must resort to circumstantial evidence and the existence of an improper motive then becomes essential. *Cf. Dirks*, 463 U.S. at 662-64, 103 S.Ct. at 3265-3266. In *Dirks*, this Court wrote:

> Contrary to the dissent's suggestion [citations], motivation is not irrelevant to the issue of *scienter*. It is not enough that an insider's conduct results in harm to investors; rather, a violation may be found only where there is 'intentional or willful conduct designed to deceive or defraud investors. . . .' *Id.* at 663 n.23.

The application of fact to law in this analysis becomes attenuated and devoid of any link to intent to defraud when the plaintiff prevails upon the jury to draw inferences of improper motives from conduct which is otherwise permissible. For example, Singer accused Olympia of secreting information to keep the price of its stock high to help it make acquisitions. Standing alone, there is nothing wrong with a company seeking to keep its stock high, but the inferences that the jury can draw from that fact can be damaging. Likewise, Singer accused Olympia of not disclosing information about Bernhardt to keep its stock high to fend off unfriendly takeovers — again not an impermissible motive, but used very effectively by the plaintiff.

In *Barker v. Henderson, etc.*, Judge Easterbrook addressed the dangers of unrestricted inference drawing. There, the plaintiffs sued a law firm and accounting firm who advised the Michigan Baptist Foundation, Inc. on various financing aspects of a retirement apartment project. The Foundation sold bonds and notes to unsophisticated investors, none of which were properly registered securities. In holding there was no direct evidence that either firm acted with intent to deceive and that no reasonable inference of intent could be drawn from the firms' knowledge of the wrongdoing, the Seventh Circuit wrote:

> The plaintiffs insist that the Firms *must* have known that the Foundation's selling documents were inaccurate and, because they did not do anything to stop the sales and answered queries from the Trustee, they *must* have had the necessary mental state. If this were enough to establish *scienter*, however, the *scienter* doctrine would not do anything to distinguish liability under § 10(b) and Rule 10b-5 from the presumptive or absolute liability under §§ 11, 12, 15, and 20. A plaintiff's case against an aider, abetter, or conspirator may not rest on a bare inference that the defendant 'must have had' knowledge of the facts. The plaintiff must support the inference with some reason to conclude that the defendant has thrown in his lot with the primary violators.

> Law firms and accountants may act or remain silent for good reasons as well as bad ones, and allowing *scienter* or conspiracy to defraud to be inferred from the silence of a professional firm may expand the scope of liability far beyond that authorized in *Ernst & Ernst* and *Herman & MacLean*. If the plaintiff does not have direct evidence of *scienter*, the court should ask whether the fraud (or cover-up) was in the interest of the defendants. Did they gain by bilking the buyers of the securities? *Cf. Dirks*, 463 U.S. at 662-64, 103 S.Ct. at 3265-66. In this case the Firms did not gain. They received none of the proceeds from the sales. They did not receive fees for rendering advice in connection with the sales to the plaintiffs. Both Firms billed so little time to the Foundation between 1974 and 1976 (and none after October 1976) that it is inconceivable that they joined a venture to feather their nests by defrauding investors. They had nothing to gain and everything to lose. There is no sound basis, therefore, on which a jury could infer that the Firms joined common cause with other offenders or aided and abetted a scheme with the necessary state of mind. *Barker v. Henderson, etc.*, 797 F.2d at 496-497.

There is no evidence from which the jury could reasonably infer that Olympia's disclosure to *Barron's* was intended to or did in fact deceive or defraud anyone. Olympia suffered at the hand of a jury sold on the premise that there *could* have been fraud so there *must* have been fraud. Like the firms in *Barker v. Henderson*, Olympia did not gain. Yet because of the lack of any test to limit inference drawing by the plaintiff, the courts below were unwilling to interfere with the jury's prerogative.

In determining whether a factual inference is reasonable, the court need not ignore the existence of other evidence in the record which tends to make that inference more or less plausible. *First National Bank of Arizona v. Cities Services Co.*, 391 U.S. 253, 284-86, 88 S.Ct. 1575, 1590-1591, 20 L.Ed.2d 569 (1968). Each of the disclosures by Olympia occurred *after* Olympia's attorney,

Joe Flom, disclosed the Bernhardt situation to Sporkin at the SEC's Division of Enforcement. If Olympia had no duty to speak, and did not speak, before the company informed the SEC on March 3, 1977 plaintiff is hard-pressed to show that Olympia's statements *after* Olympia informed the SEC were part of a scheme to defraud. The facts upon which Singer relies to support his allegation are not susceptible of the interpretation he seeks to give them.

II. Recent Antitrust Decisions Limiting the Range of Permissible Inferences Provide an Appropriate Standard for Securities Fraud

In the antitrust field, this Court instructed the lower courts to remove the case from the jury if plaintiff's case requires inferences from circumstantial evidence that are "implausible." In *Matsushita Electrical Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986), this Court wrote:

> It follows from these settled principles that if the factual context renders respondents' claim implausible if the claim is one that simply makes no economic sense — respondents must come forward with more persuasive evidence to support their claim than would otherwise be necessary. *Id.* at 587, 106 S.Ct. at 1356.

Without direct evidence of a predatory pricing conspiracy, and left only with circumstantial evidence, the Court stated, "antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case." 475 U.S. at 583, 588, 106 S.Ct. at 1354, 1357. In such a case, the Court said the plaintiff resisting a summary judgment motion "must show that the inference of conspiracy is reasonable in light of the competing inference of independent action or collusive action that could not have harmed respondents." *Id.* The Court noted that in *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 763, 104 S.Ct. 1464, 1470, 79 L.Ed.2d 775 (1984), "we emphasized that courts should not permit factfinders to infer conspiracies when such inferences are implausible, because the effect of such practices

is often to deter procompetitive conduct." *Matsushita*, 475 U.S. at 593, 106 S.Ct. at 1360. "Thus, mistaken inferences in cases such as this one are especially costly, because they chill the very conduct the antitrust laws are designed to protect." *Id.* at 594, 106 S.Ct. at 1360.

The Court noted that the only "direct evidence" of a predatory pricing conspiracy on which the lower court relied was direct evidence of subsidiary combinations which at most was only circumstantial evidence of the overall predatory pricing conspiracy plaintiffs sought to prove. *Id.* at 595-96, 106 S.Ct. at 1360-61. The Court reviewed this circumstantial evidence and concluded that it did not establish a plausible motive to engage in the alleged predatory pricing conspiracy:

> Lack of motive bears on the range of permissible conclusions that might be drawn from ambiguous evidence: if petitioners had no rational economic motive to conspire, and if their conduct is consistent with other, equally plausible explanations, the conduct does not give rise to an inference of conspiracy. *Id.* at 596-97, 106 S.Ct. at 1361.

The Court concluded that plaintiffs alleging an antitrust conspiracy involving predatory pricing can only avoid summary judgment if they produce evidence "tend[ing] to exclude the possibility that petitioners underpriced respondents to compete for business rather than to implement an economically senseless conspiracy." *Id* at 597-98, 106 S.Ct. at 1362 (citations and quotations marks omitted).

Petitioner urges the same treatment in an implied private right of action case under Rule 10b-5. Mistaken inferences in 10b-5 cases are equally costly: they will undermine the policy considerations of *Hochfelder* and *Herman & MacLean* and, as a result, chill the conduct (e.g., public disclosure) the securities acts seek to encourage.

The fact situation herein presents the classic situation of inference drawing gone awry. All the evidence supporting

Olympia's purported intent to defraud is circumstantial. On Olympia's motion for directed verdict, a *Matsushita* inquiry into the "plausibility" of inferences of intent to defraud should have been mandated. The courts below, however, abdicated this responsibility without pretense in favor of a "hands off" approach to the jury's fact finding.[9] As a result, Olympia was held to have defrauded Singer without a rational motive or plausible explanation.

Why Olympia would intentionally deceive investors after it had disclosed what it knew about Bernhardt to the SEC was never explained. How Senna's response to *Barron's*, which squelched merger rumors and caused the stock to decline, can be squared with an intent to deceive investors by allegedly withholding facts from *Barron's* to keep the price of the stock high, also remains a mystery. What Singer was able to do was cloud the chronology of events and assert wild inferences to suggest that possible motives were actually deceptions. The jury ignored the relevant dates and abandoned its common sense. There were simply no facts to link a plausible motive to the allegation that Olympia deceitfully withheld information to keep its stock high.

The courts below impermissibly deferred in spite of that lapse. Direction from this Court applying the *Matsushita* reasoning in the 10b-5 context would serve to protect against such erratic jury findings and spur the lower courts to more aggressively protect the policy requirement that intent to defraud must be proven before liability may attach.[10]

---

[9] Some guidance on the proper trial court role is necessary. Compare *Mayer v. Oil Field Systems Corp.*, 803 F.2d 749 (2d Cir. 1986) (granting summary judgment on *scienter* issue and citing *Matsushita*) with *Wechsler v. Steinberg*, 733 F.2d 1054 (2d Cir. 1984) (inferences of *scienter* held to be a wide open jury question.).

[10] An adjustment of the responsibilities of the courts in this manner would not be unprecedented. *See Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986), wherein the Court ruled that a heightened

(Footnote continued)

III. The Sufficiency of "Recklessness" to Prove *Scienter* Demands a More Restrictive Approach to Drawing Inferences

This Court in *Hochfelder* clearly eliminated negligence as a possible basis for a finding of 10b-5 liability. However, it left open the question of whether or not recklessness could be enough under certain circumstances. *Hochfelder*, 425 U.S. at 192-93 n.12, 96 S.Ct. at 1381 n.12. The majority view in the Courts of Appeals is that recklessness satisfies this *scienter* requirement. *Van Dyke v. Coburn Enterprises, Inc.*, 873 F.2d 1094, 1100 (8th Cir. 1989), and cases collected therein: *Woods v. Barnett Bank*, 765 F.2d 1004, 1010 (11th Cir. 1985); *Dirks v. S.E.C.*, 681 F.2d 824, 844-45 (D.C. Cir.), *rev'd. on other grounds*, 463 U.S. 646, 103 S.Ct. 3255, 77 L.Ed.2d 911 (1982); *Broad v. Rockwell International Corp.*, 642 F.2d 929, 961 (5th Cir.), *cert. denied*, 454 U.S. 965, 102 S.Ct. 506, 70 L.Ed.2d 380 (1981); *Sharp v. Coopers & Lybrand*, 649 F.2d 175, 192 (3d Cir. 1981), *cert. denied*, 455 U.S. 938, 102 S.Ct. 1427, 71 L.Ed.2d 648; *Nelson v. Serwold*, 576 F.2d 1332, 1337 (9th Cir.), *cert. denied*, 439 U.S. 970, 99 S.Ct. 464, 58 L.Ed.2d 431 (1978); *Rolf v. Blyth, Eastman Dillon & Co.*, 570 F.2d 38, 44-47 (2d Cir.), *cert. denied*, 439 U.S. 1039, 99 S.Ct. 642, 58 L.Ed.2d 698 (1978); *Sunstrand Corp. v. Sun Chemical Corp.*, 553 F.2d 1033, 1045 (7th Cir.) *cert. denied*, 434 U.S. 875, 98 S.Ct. 225, 54 L.Ed.2d 155 (1977). *See also Hackbart v. Holmes*, 675 F.2d 1114, 1117 (10th Cir. 1982); *Mansbach v. Prescott, Ball & Turben*, 598 F.2d 1017, 1024 (6th Cir. 1979).

The availability of recklessness to satisfy the *scienter* test has greatly eased the burden of proving intent for a 10b-5 plaintiff

---

burden of proof ("clear and convincing evidence") must be considered by the trial judge on a motion for summary judgment. ("Thus in ruling on a motion for summary judgment, the judge must view the evidence presented through the prism of the substantive evidentiary burden.") If "clear and convincing evidence" was the standard in 10b-5 cases, *Anderson* would provide the necessary protection. *Herman & MacLean*, however, settled the burden of proof issue ("preponderance of the evidence") on 10b-5 cases without confronting the problem of what dangers wildly drawn inferences may present.

in a private right of action. While recklessness has been delineated as more than negligence (conduct which is "highly unreasonable," "an extreme departure from the standards of ordinary care")[11], the difference between recklessness and negligence often blurs in the minds of the jury. If reckless conduct is allowed to satisfy the test of *scienter*, as it already is in most of the Circuits, some limitation on inference drawing is required to ensure that the two standards, negligence and recklessness, do not effectively become one. Failure to do so will further undermine the purposes of the intent requirement which *Hochfelder* and *Herman & MacLean* sought to preserve. A *Matsushita*-type inquiry will provide an appropriate check on the potential for abuse of the recklessness standard.

IV. The Current Law on What Inferences May Be Drawn Allowed the Jury to Find Fraud Based upon Four Highly Implausible Situations

Although there is no evidence or even allegation that Olympia profited financially by its alleged deception, Singer argued that the jury could infer Olympia engaged in fraud because it had an ulterior motive to keep the price of its stock high. On its face, this does not square with the disclosures that Olympia actually made. If rumors in the market that Olympia was part of a negotiated merger had served to inflate the stock price to an artificially high level, Senna's denial of any merger injected *accurate* information into the marketplace with the effect of *depressing* the stock price.

Nor are plaintiff's explanations of why Olympia wanted to bolster the price of its stock supported by any evidence:

Motive One: All Brands

Plaintiff cites Olympia's desire to acquire companies as an example of a motive to keep the price high, yet there is no evidence that during the relevant period Olympia either acquired

---

[11] *Decker v. Massey-Ferguson, Ltd.*, 681 F.2d at 120.

any company or considered acquiring any company using its stock. In fact, the only company Olympia considered acquiring in any fashion was All Brands, and the only testimony submitted about All Brands was that this transaction was too small of a deal to have been a stock transaction; All Brands was always a cash deal (JA 1009-1012). If it was to be a cash deal, there was no motivation to keep the stock at an artificially high level.

More importantly, Singer's own submission of Olympia deposition testimony unequivocally states that the All Brands deal was dead once Olympia received the February 22, 1977 McKinsey report (JA 596). Thus, by the time Olympia made its first disclosure on March 4, 1977 to *Barron's*, Olympia had irrefutably abandoned the All Brands deal. Without facts to support a motive in March, when the fraud supposedly occurred, there was absolutely no evidence from which the jury could have inferred that Olympia intended to defraud Singer or the marketplace to protect its bargaining position for All Brands.[12]

Motive Two: The Lone Star Exchange

The second motive Olympia supposedly had to defraud Singer or the market was to keep the stock price high until Seattle First completed the exchange of Lone Star shares so Olympia would not be sued by a Lone Star shareholder (JA 1083-1084). With the approval of the merger by the shareholders on December 28, 1976, the deal was final, and the only action the Lone Star shareholders had to take was the ministerial act of exchanging their shares for Olympia stock. There was not one shred of evidence in the record that any Lone Star shareholder was considering suit or even what someone might sue for. The sole piece of evidence to support this theory of motive is Exh. 120, from the personal notes of Olympia investment banker, Joseph Self. Although undated, Self testified that he did not write this

[12] The All Brands transaction was the only evidence cited by the Court in its Memorandum and Order of January 27, 1988, denying Olympia's Motion for Directed Verdict, to support Singer's contention that Olympia attempted to use the artificially high price of Olympia stock to its advantage (JA 1667).

document until at least a week *after* Olympia went to the SEC and *after* the price of Olympia had already fallen some 25 points (JA 717-720). All the document says is, "problem accentuated by Seafirst delay in exchange. . . ." Although the memo is ambiguous on its face because it does not identify the "problem," plaintiff successfully elicited from Self and Goodman testimony that this "problem" may have been related to the issuance of the press release (JA 508, 716). However, this evidence ascribes no impermissible motive to the circumstances; it only says that the "problem is accentuated," not that Olympia plans to willfully withhold information. Even if the problem was whether or not to issue a press release, as Singer contends, this language does not show that Olympia wanted to conceal anything. Exhibit 120 lends no substance to the sheer speculation that Olympia was trying to withhold information to insure the exchange of Lone Star shares and was written so late as to be practically irrelevant since Olympia had gone to the SEC and the stock had already dropped.

Motive Three: Family Stock Ownership

Singer also asserts that the jury can infer Olympia's intent to deceive investors from the mere fact that the Schmidt family owned a tremendous amount of the Company stock and did not want to see the price of the stock fall (JA 1084). The Schmidt family lost more money from Bernhardt's fraud than anyone else — some $32,000,000. Yet despite all the "knowledge" Olympia allegedly had about Bernhardt, no member of this large family unloaded any stock at the artificially high prices (Exh. 62, JA 1336). Further, even though inside members of the family were under a trading ban *after* March 16, 1977, when the stock had already dropped 30 points (Exh. 147, JA 1646), no inside or outside member of the family sold stock to benefit from the "information" before the ban or during the stock's precipitous fall (Exh. 62, JA 1336).

Motive Four: Avoid a Takeover

Finally, plaintiff argues that Olympia intended to defraud Singer or the market to avoid an unfriendly takeover (JA 1084).

Again, concern about a potential takeover is not an impermissible corporate motive. Moreover, plaintiff claims that Olympia was withholding information to avoid a takeover and, at the same time claims that Olympia knew Bernhardt had fabricated all of the rumors of a takeover. If Olympia knew the takeover rumors were false, it logically would not then have been concerned about a takeover. If it did not know the rumors were false, there can be no liability. Furthermore, it is impossible to reconcile the argument that Olympia was trying to keep the price of its stock high to avoid a takeover attempt in its public disclosures on and after March 4 with the fact that, on March 3, the Company went to the SEC. At that time Olympia agreed to a suspension of trading in its stock knowing that the resulting SEC investigation would undoubtedly have a depressing effect on the price.

Singer relies heavily on the "plausibility" of these "motives" to support his theory of intent. These motives, however, are notoriously susceptible to being misunderstood. A potential nefarious motive can be drawn from almost any conduct of Olympia since every company has a similar desire to keep the price of its stock high for a myriad of valid corporate purposes. Olympia's alleged desire to keep the price of its stock high is far more consistent with its permissible business objectives than with an intent to deceive. There must be some substantial evidence for inferring a wrongful rather than legitimate motive. The mere existence of a possible motive will not substitute for evidence of intent to deceive. Beyond plaintiff's bald conclusion, there is no evidence that Olympia was exploiting the circumstances for its own gain or receiving any benefit from its alleged deception. There is simply no evidence which corroborates a fraudulent intent and bridges the gap between the mere existence of a plausible motive and the actual intent to deceitfully act on it.

CONCLUSION

The Petition for a Writ of Certiorari should be granted to consider importing into securities cases the limitations on inferences in antitrust cases so that the purpose underlying the securities acts is effectuated.

Respectfully submitted,

WILLIAM M. BITTING
Counsel of Record
DEAN E. DENNIS
HILL, FARRER & BURRILL

By ____________________________
WILLIAM M. BITTING

APPENDIX

UNITED STATES COURT OF APPEALS
for the
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the sixteenth day of August, one thousand nine hundred and eighty-nine.

LOUIS P. SINGER, as Successor in interest to TROSTER, SINGER & CO.,

Plaintiff-Appellee
Cross-Appellant,

DOCKET NUMBER
88-7962, 88-7720

—v.—

OLYMPIA BREWING COMPANY,

Defendant-Appellant
Cross-Appellee.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by Appellant-Cross-Appellee OLYMPIA BREWING COMPANY.

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ Elaine B. Goldsmith
ELAINE B. GOLDSMITH
Clerk

UNITED STATES COURT OF APPEALS

For the Second Circuit

Nos. 652; 653 August Term 1988

Argued: January 24, 1989 Decided: June 28, 1989

Docket Nos. 88-7692, 88-7720

LOUIS P. SINGER, as Successor in Interest to TROSTER, SINGER & CO.,

Plaintiff-Appellee Cross-Appellant,

— against —

OLYMPIA BREWING COMPANY,

Defendant-Appellant Cross-Appellee.

BEFORE: MESKILL, PRATT, and ALTIMARI, *Circuit Judges*.

Appeal from order of the United States District Court for the Eastern District of New York, Joseph M. McLaughlin, *Judge*, denying alternative motions for judgment notwithstanding the verdict, new trial, or partial new trial; cross appeal from amended judgment granting defendant's motion for setoff of settlement amount paid to plaintiff by third party.

Affirmed.

EDWARD T. JOYCE, Chicago, IL (Joyce & Kubasiak, Chicago, IL, Lewis S. Sandler, New York, NY of Counsel), *for Plaintiff-Appellee Cross-Appellant*.

WILLIAM M. BITTING, Los Angeles, CA (Hill, Farrer & Burrill, Darlene B. Fischer, Dean E. Dennis, William A. White, Los Angeles, CA, Amy D. Kanengiser, Spengler, Carlson, Gubar, Brodsky & Frischling, New York, NY, of Counsel), *for Defendant-Appellant Cross-Appellee.*

PRATT, *Circuit Judge*:

Defendant Olympia Brewing Company (Olympia) appeals from an order of the United States District Court for the Eastern District of New York, Joseph M. McLaughlin, *Judge*, denying Olympia's alternative motions under Fed. R. Civ. P. 50(b) and 59 for judgment n.o.v., a new trial, and a partial new trial, made on the ground that there was insufficient evidence to support the jury's verdicts in this securities fraud action. Plaintiff Singer cross-appeals from an amended judgment entered on August 2, 1988, that reduced Singer's judgment against Olympia from $2,958,350.50 to $1,708,350.50 to reflect a setoff of $1,250,000 based on the post-verdict settlement Singer had obtained in another action from a third party, Loeb Rhoades & Co. (Loeb Rhoades).

Because there was sufficient evidence to support the jury's verdicts, we affirm the district court's denial of Olympia's motions for post-verdict relief. On the cross-appeal, we conclude that the setoff was proper and thus affirm the amended judgment.

I. BACKGROUND

Singer, as successor-in-interest to Troster, Singer & Co. (Troster Singer), brought this securities fraud action against Olympia, alleging primary and aiding-and-abetting violations of §§ 15 and 17 of the Securities Act of 1933, 15 U.S.C. §§ 77o and 77q; §§ 10, 15, and 20 of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78j, 78o, and 78t; and SEC rules 10b-5 and 15cl-2, 17 C.F.R. § 240.10b-5 and § 240.15cl-2. Singer also alleged

violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961 *et seq.*, but that claim was dismissed before trial.

In 1975-1977 Olympia was an independent beer manufacturer and distributor operating primarily in the northwestern part of the United States. Its stock was traded over the counter. Singer's claims arose out of a series of transactions in Olympia stock by Troster Singer, a professional market maker, in a market that had been artificially inflated by the actions of Loeb Rhoades, a registered broker-dealer.

In 1975 R. Jack Bernhardt, a registered representative and securities salesman for Loeb Rhoades, began inducing his customers to purchase Olympia stock. Through various means, including the spreading of false rumors of an imminent takeover of Olympia, he manipulated the market and caused an artificial increase in the price of Olympia's stock.

In March 1977 Troster Singer acquired a large number of shares of Olympia stock at the artificially inflated prices, but later suffered substantial losses when the fraud was revealed and the price of the stock plummeted. Singer claimed that Olympia's officers knew or should have known of Bernhardt's or Loeb Rhoades's manipulation of the market before Olympia made voluntary public disclosures in an article in *Barron's* and in two press releases, and that, in order to take advantage of the artificially high price of its stock, Olympia made material misstatements or omissions by failing to reveal the known fraud. Singer further claimed that Troster Singer had relied on Olympia's misstatements or omissions to its substantial injury.

The jury found against Olympia in special verdicts establishing, with respect to the primary § 10(b) and rule 10b-5 violation, that Olympia made either material misstatements or omissions; that it acted with intent to defraud or with reckless disregard for the truth; that Troster Singer reasonably relied on Olympia's misrepresentations or omissions; and that Olympia thereby caused Troster Singer damages in the amount of $1,354,592.50. With respect to the aiding-and-abetting violation,

it was uncontested that either Bernhardt or Loeb Rhoades had violated § 10(b) and rule 10b-5, and the jury found, in its special verdicts, that Olympia had known of Bernhardt's or Loeb Rhoades's activities; that it had given either Bernhardt or Loeb Rhoades substantial assistance in effecting the violation; and that the substantial assistance had caused Troster Singer's losses of $1,354,592.50. To the jury's verdict of $1,354,592.50, the trial judge added $1,603,758.00 in prejudgment interest for a total judgment of $2,958,350.50.

II. DISCUSSION

A. *Motions for Judgment Notwithstanding the Verdict and New Trial*

The post-verdict motions need not detain us long. Asserting that there was insufficient evidence to support the jury's findings that Olympia made material misstatements or omissions, acted with scienter, and caused Singer's losses, Olympia claims that the district court should have granted its post-verdict motions.

> Judgment n.o.v. is warranted only where
>
> (1) there is such a complete absence of evidence supporting the verdict that the jury's findings could only have been the result of sheer surmise and conjecture, or (2) there is such an overwhelming amount of evidence in favor of the movant that reasonable and fair minded [people] could not arrive at a verdict against him.

Bauer v. Raymark Industries, Inc., 849 F.2d 790, 792 (2d Cir. 1988) (quoting *Mallis v. Bankers Trust Co.*, 717 F.2d 683, 688-89 (2d Cir. 1983)); *Newmont Mines Limited v. Hanover Insurance Co.*, 784 F.2d 127, 132 (2d Cir. 1986).

Having carefully reviewed the record, we cannot conclude that the jury's special verdicts were "the result of sheer surmise and conjecture" or that "reasonable and fair minded [people] could not [have] arrive[d] at a verdict against" Olympia. To the

contrary, the evidence amply supports the jury's determinations that Olympia made material misstatements or omissions, did so with scienter, and caused Singer's losses of $1,354,592.50. We therefore affirm the district court order denying the motion for judgment n.o.v.

Insofar as Olympia sought a new trial, our scope of review is narrowly circumscribed. We may reverse a denial of a new trial "only for a clear abuse of discretion, and when a new trial is sought on the ground that the verdict was against the weight of the evidence 'we have disclaimed the authority to review a ruling on such a motion'." *Bauer v. Raymark Industries, Inc.*, 849 F.2d at 792 (quoting *Newmont Mines Limited v. Hanover Insurance Co.*, 784 F.2d at 133). To the extent that we have anything to review, we conclude that, under the circumstances here, there was no abuse of discretion.

B. *Setoff*

A more significant problem is presented by the setoff issue. In his cross appeal Singer argues that the trial court erred in setting off the $1,250,000 that Singer had received from Loeb Rhoades in settlement of Singer's separate action against Loeb Rhoades for the same injury. We disagree.

In the fall of 1980, prior to initiating this lawsuit against Olympia, Singer had commenced a separate action against Loeb Rhoades in the Eastern District of New York charging Loeb Rhoades with manipulating Olympia stock. In his complaint, Singer advanced the same claims, including a RICO violation, against Loeb Rhoades as he later alleged in the instant action, and he sought identical damages, including treble damages for violating RICO. The Loeb Rhoades action was transferred to the Northern District of Illinois since at least eighteen other actions arising out of the Olympia controversy were pending there against Loeb Rhoades. In this New York action against Olympia the RICO claim was dismissed prior to trial, but it survived a motion to dismiss in the Illinois action against Loeb Rhoades.

Two weeks after the verdicts were rendered against Olympia in New York, and on the day Loeb Rhoades was to go to trial in Illinois, Singer settled with Loeb Rhoades for $1,250,000. Olympia then sought to offset that Illinois settlement amount against the New York judgment. Judge McLaughlin granted the motion and entered an amended judgment of $1,708,350.50 against Olympia. Singer contends that the setoff was improper.

As a threshold matter, it has been unclear whether in a 10b-5 cause of action the federal securities laws incorporate the state law of setoff or require a uniform federal rule for setoff. *See, e.g., U.S. Industries, Inc. v. Touche Ross & Co.*, 854 F.2d 1223, 1235-39, 1260-63 (10th Cir. 1988) (determining whether defendant entitled to a credit for settlement without determining whether federal or state law applied); *Harris v. Union Electric Co.*, 846 F.2d 482, 485 (8th Cir. 1988) (same); *Seymour v. Summa Vista Cinema, Inc.*, 809 F.2d 1385, 1389 n.4 (9th Cir. 1987) ("It is unclear whether federal or state law applies to the settlement offset issue."); *Ratner v. Sioux Natural Gas Corp.*, 719 F.2d 801, 803-04 (5th Cir. 1983) (noting that both state cases and federal securities cases recognize the "one satisfaction" rule, but applying state law).

We believe a uniform national rule of settlement credit is appropriate for several reasons. First, whether to credit a defendant with a setoff affects substantive rather than procedural rights of the parties under the federal securities laws. Although most circuits have, in securities actions, incorporated state statutes for precedural matters, such as statutes of limitations, *see, e.g., Wood v. Combustion Engineering, Inc.*, 643 F.2d 339, 341-42 (5th Cir. 1981); *O'Hara v. Kovens*, 625 F.2d 15, 17 (4th Cir. 1980), *cert. denied*, 449 U.S. 1124 (1981); *Cook v. Avien, Inc.*, 573 F.2d 685, 694 (1st Cir. 1978); *Stull v. Bayard*, 561 F.2d 429, 431-32 (2d Cir. 1977), *cert. denied*, 434 U.S. 1035 (1978); *Parrent v. Midwest Rug Mills, Inc.*, 455 F.2d 123, 125 (7th Cir. 1972); *but see In re Data Access Systems Securities Litigation*, 843 F.2d 1537 (3d Cir.) (*in banc*) (holding that statute of limitation for § 10(b) and rule 10b-5 actions is to be borrowed from analogous federal securities law rather than incorporated from state law), *cert. denied*, 109 S. Ct. 131 (1988), the circuits

generally have not adopted state law as the rule of decision to govern substantive aspects of implied private securities actions. *See Wolf v. Frank*, 477 F.2d 467, 479 (5th Cir.) (federal law determines the availability of prejudgment interest), *cert. denied*, 414 U.S. 975 (1973); *Drachman v. Harvey*, 453 F.2d 722, 726-27 (2d Cir. 1971) (federal law determines the definition of a "shareholder" entitled to bring suit), *rev'd on other grounds in rehearing in banc*, 453 F.2d 736 (2d Cir. 1972); *Baumel v. Rosen*, 412 F.2d 571, 575 (4th Cir. 1969) (proper measure of damages is determined by federal law), *cert. denied*, 396 U.S. 1037 (1970).

Second, adoption of state statutes governing credit for settlement would lead to disparate results in cases in which (1) the state statutes differed or (2) state interpretation of similarly worded statutes differed. Because most securities fraud actions involve multiple parties from various states and in many cases at least some of the defendants settle, the incentive to forum-shop for favorable state rules would be heightened in many cases.

We therefore hold that federal law should determine whether a defendant in a federal securities action is entitled to a credit against judgment for the settlement by another party to the dispute.

The next question, of course, is what should the federal rule be? We thnk it must be the one satisfaction rule, which provides that a plaintiff is entitled to only one satisfaction for each injury. *See U.S. Industries, Inc. v. Touche Ross & Co.*, 854 F.2d at 1236, 1261-62; *Harris v. Union Electric Co.*, 846 F.2d at 485; *Marcus, Stowell & Beye Government Securities, Inc. v. Jefferson Investment Corp.*, 797 F.2d 227, 233 (5th Cir. 1986); *Ratner v. Sioux Natural Gas Corp.*, 719 F.2d at 803. *See also* N.Y. Gen. Oblig. Law § 15-108 (McKinney 1989) *and* Ill. Rev. Stat. ch. 70 para. 302 § 2(c) (1987). The rule has also been approved in the Restatement (Second) of Torts § 885(3) (1979):

> A payment by any person made in compensation of a claim for a harm for which others are liable as tortfeasors diminishes the claim against the tortfeasors, at least to the extent of the payment made, whether

> or not the person making the payment is liable to the injured person and whether or not it is so agreed at the time of payment or the payment is made before or after judgment.

Under this rule, when a plaintiff receives a settlement from one defendant, a nonsettling defendant is entitled to a credit of the settlement amount against any judgment obtained by the plaintiff against the nonsettling defendant as long as both the settlement and judgment represent common damages. *See Hess Oil Virgin Islands Corp. v. UOP, Inc.*, 861 F.2d 1197, 1208 (10th Cir. 1988); *U.S. Industries, Inc.*, 854 F.2d at 1236; *see also* Restatement (Second) of Torts § 885(3), comments e & f.

Singer accepts application of the one satisfaction rule in this case and even concedes that he suffered only one injury. Nevertheless, he argues that the settlement credit was improperly applied here because Loeb Rhoades had settled not only the securities claims but also a RICO claim that exposed Loeb Rhoades to possible treble damages. Singer advances the novel argument that where a plaintiff may be entitled to more damages from one defendant than from another, the one satisfaction rule should require that the settlement be deducted, not from the amount to be recovered under the judgment but from the highest amount of "provable damages" that could have been recovered against the settling defendant. This argument borders on the frivolous.

In the first place, Singer's proposed interpretation of the rule would run counter to the requirement, found in virtually every case and statute adopting the rule, as well as in the Restatement (Second), that the settlement amount be deducted from the claim or judgment in the litigated case, and not from the potential claim or judgment in the settled case.

Further, Singer seeks to construct his "provable damages" against Loeb Rhoades as follows: (1) Singer obtained a jury verdict on the securities claim against Olympia for $1,354,592.50 representing out-of-pocket damages; (2) if he had been successful in a trial against Loeb Rhoades, Singer might have received the

same damages on the securities claim; (3) Singer might also, however, have been able to establish his RICO claim against Loeb Rhoades, and, if so, he would have recovered treble damages amounting to $4,063,777.50; (4) in addition, Singer would have been entitled to prejudgment interest of $1,603,758 on the out-of-pocket amount, thus creating total "provable damages" of $5,667,535.50. Singer would have us conclude that the settlement amount of $1,250,000 should be subtracted from this "provable damages" figure, and that since the remaining sum of $4,417,535.50 exceeds the judgment awarded against Olympia, Olympia would be entitled to no setoff at all.

We decline to journey with Singer down this road of speculation for two reasons. First, there has been no adjudication that anyone was liable to Singer on the RICO claim. *See Hines v. IBG International, Inc.*, 813 F.2d 1331, 1335 (4th Cir. 1987) (plaintiff may not treble jury verdict before setting off settlement amount where settling defendants settled treble damage claim but nonsettling defendant went to trial and prevailed on that claim). Second, Singer relies on analytically dissimilar cases in which a plaintiff sues multiple defendants for treble damages, settles with one or more of them, and then prevails at trial against the remaining defendants. In such cases, we have held that it is proper to treble the damage award before crediting settlement payments. *See e.g., State of New York v. Hendrickson Brothers, Inc.*, 840 F.2d 1065, 1086-87 (2d Cir.) (antitrust case), *cert. denied*, 109 S. Ct. 128 (1988); *Hydrolevel Corp. v. American Society of Mechanical Engineers, Inc.*, 635 F.2d 118, 130 (2d Cir. 1980) (same), *aff'd*, 456 U.S. 556 (1982). Here, however, Singer's RICO claim against Olympia in the New York action was dismissed prior to trial, and its parallel RICO claim against Loeb Rhoades was included in the overall settlement of the Illinois action. In such a case, we will not speculate either that a RICO violation would have been established had Singer proceeded to trial in Illinois, or that, had there been a RICO trial and recovery there, the RICO damages before trebling would have been the same as the damages awarded in the New York case. Although, as Singer claims, the settling defendant may well have considered its possible exposure to treble damages in

deciding to settle, it would be entirely speculative for us, absent a finding of liability on the RICO claim, to treble in the settled Illinois case the actual damages awarded in the tried New York case.

III. CONCLUSION

In summary, the district court properly subtracted the Illinois settlement amount from the judgment in the New York case. Both the order denying alternative motions for judgment notwithstanding the verdict, new trial, or partial new trial and the amended judgment incorporating the setoff of the amount received by Singer in settlement of his separate action for the same injury are affirmed.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

LOUIS P. SINGER, As Successor in Interest to TROSTER, SINGER & CO.,

Plaintiff,

– against –

OLYMPIA BREWING COMPANY,

Defendant.

ORDER
83 CV 0589

McLAUGHLIN, District Judge

Defendant has made alternative motions for judgment n.o.v., a new trial, a partial trial, and for a reduction of damages. *See* Fed. R. Civ. P. 50(b), 59. For the reasons developed in this Court's Memorandum and Order dated January 27, 1988, the motions are denied. Defendant has also moved for relief from the judgment. In view of the cross-allegations surrounding this motion and indications that plaintiff intends to submit further papers to the Court on this issue, the Court reserves decision on this motion. It is hereby ordered that defendant's motion for a stay of execution of the judgment pending disposition of defendant's motion for relief from the judgment is hereby granted.

SO ORDERED.

Dated: Brooklyn, New York
March 25, 1988

/s/ Joseph M. McLaughlin
JOSEPH M. McLAUGHLIN, U.S.D.J.

The Clerk shall make copies of this Order and shall serve them upon the parties.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

LOUIS P. SINGER, as Successor in Interest to TROSTER, SINGER & CO.

Plaintiff,

– against –

OLYMPIA BREWING COMPANY,

Defendant.

MEMORANDUM AND ORDER

83 CV 589

McLAUGHLIN, District Judge

This case, in which plaintiff alleges violations of federal securities laws, was tried to a jury. At the close of plaintiff's case, defendant moved for a directed verdict under Fed. R. Civ. P. 50(a). The Court reserved decision. The jury subsequently returned a verdict in plaintiff's favor. Defendant has moved to set aside the verdict under Fed. R. Civ. P. 50(b). Plaintiff has cross-moved for an award of prejudgment interest.

FACTS

The Complaint arises out of a series of over-the-counter transactions in the stock of defendant, Olympia Brewing Company ("Olympia"), by Troster, Singer & Co. ("Troster Singer"), predecessor-in-interest of plaintiff. The Complaint alleges that from October 14, 1974 to February 11, 1977, R. Jack Bernhardt ("Bernhardt") was employed by Loeb Rhoades & Company ("Loeb Rhoades") as a registered representative and securities salesman. From June 1975 to March 15, 1977 Loeb Rhoades and Bernhardt allegedly caused the price of Olympia's stock to be artificially inflated by engaging in fraudulent trading practices.

The gravamen of the Complaint is that Olympia's officers knew or should have known of the fraud by January 1977, yet

chose not to reveal it. Finally, in March, the officers made statements to the press and issued press releases in which they falsely, or in reckless disregard for the truth, stated that they did not know the reason for the rise in price of Olympia's stock. Troster Singer allegedly relied on such omissions and statements, purchased large amounts of Olympia stock, and suffered substantial financial loss when Loeb Rhoades' and Bernhardt's fraud subsequently was revealed publicly, and the price of the stock collapsed.

Counts I and II of the Complaint were tried to the jury. These counts allege primary and aiding and abetting violations of sections 15 and 17 of the Securities Act of 1933, 15 U.S.C. §§ 77o, 77q; and sections 10, 15, and 20 of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78j, 78o, 78t, and Rules 10b-5 and 15cl-2, 17 C.F.R. §§ 240.10b-5, .15cl-2, promulgated thereunder.

At trial, plaintiff introduced testimony of nine witnesses, including himself. Defendant called four witnesses. The jury returned a verdict in plaintiff's favor on both claims, and concluded that plaintiff had suffered damages in the amount of $1,354,592.50 on both claims. These motions followed. After a thorough review of the record, the Court makes the following determinations.

DISCUSSION

1. Defendant's Motion for a Directed Verdict and to Set Aside the Verdict

A. *Standard of Review*

Defendant's motion should be granted only if

> "(1) there [was] such a complete absence of evidence supporting the verdict that the jury's findings could only have been the result of sheer surmise and conjecture, or (2) there [was] such an overwhelming amount of evidence in favor of [defendant] that reasonable and fair minded men could not [have] arrived at a verdict against [it]."

Mallis v. Bankers Trust Co., 717 F.2d 683, 688-89 (2d Cir. 1983) (quoting *Mattivi v. South African Marine Corp., "Huguenot"*, 618 F.2d 163, 168 (2d Cir. 1980)).

B. *Primary Violation*

Olympia asserts that the evidence does not support a verdict on the primary violation count essentially for three reasons: (1) Olympia did not know of Loeb Rhoades' or Bernhardt's fraud until such fraud was revealed publicly, (2) there was insufficient evidence to support a finding that Olympia's statements to the press were untrue or misleading, and (3) there was no evidence that Olympia or its officers attempted to use to their advantage the artificially high price of Olympia stock. I disagree.

First, there was sufficient evidence for the jury to infer that, at least by mid-February 1977, Olympia's officers were aware that Loeb Rhoades' employees had been manipulating the price of Olympia stock. *See* Trial Transcript ("Tr.") 645-56, 716; Trial Exhibit ("Ex.") 139. In addition, on March 3, 1977 Olympia's counsel called the Securities and Exchange Commission ("SEC") and alerted SEC officials to Loeb Rhoades' activities. Tr. 933-36. Prior to that date, counsel had prepared on Olympia's behalf a civil complaint that alleged stock fraud by Bernhardt. Ex. 96; Tr. 498-99.

The jury thus reasonably could have concluded, as it did, that statements made by Olympia from March 6 to March 14, 1977, in which Olympia stated that it could not explain the sharp rise in the price of its stock, were made falsely or in reckless disregard for the truth.

Finally, I am not persuaded that the evidence fails to support a finding that Olympia had a financial motive in making its untrue statements. Olympia admits that in January and February 1977 it was considering an acquisition of the All Brands Company. Tr. 791. Although Olympia's then-president denied it at trial, Tr. 791-92, there was evidence presented that Olympia was considering an acquisition of All Brands by using the high price of Olympia stock. *See* Ex. 16, 144; Tr. 421-24.

In short, the Court concludes that the evidence presented by plaintiff in support of his claim of a primary violation is more than the slender reed that Olympia suggests it is. The jury was justified in concluding, as it did, that plaintiff proved that defendant had committed a primary violation of the federal securities laws.

C. *Aiding and Abetting*

Olympia's second argument is that the evidence does not support a finding that Olympia aided and abetted Loeb Rhoades' and Bernhardt's primary securities violation. Once again, I disagree.

Defendant does not contest that plaintiff proved that Bernhardt and Loeb Rhoades committed a primary securities law violation. Proof of the aiding and abetting count also required plaintiff to prove, among other things, that Olympia (1) actually knew of Bernhardt's and Loeb Rhoades' venture, (2) associated itself with such venture, (3) participated in the venture as something it wished to make succeed, and (4) rendered substantial assistance to the venture. *See IIT v. Cornfeld*, 619 F.2d 909, 922 (2d Cir. 1980).

For the reasons stated in the previous section, I conclude that the jury could have reasonably found that Olympia knew of the illegal venture prior to March 1977.

The primary violation, the venture, was perpetrated by registered securities dealers who caused their customers to buy and sell Olympia stock after falsely spreading rumors that Olympia was to be the target of an imminent acquisition. This caused the price of Olympia stock to become inflated. Olympia rendered substantial assistance to the venture by providing false and misleading information to the public concerning the price of its stock. The difficult questions presented by this case are whether Olympia associated with the venture and participated in it. Although no evidence was presented to suggest that Olympia conspired with the primary violators or intended that they profit from their venture, the relevant fact supported by the

evidence is that Olympia knew and intended that its conduct would permit continued success of the venture. Olympia associated with the venture because perpetration of the venture was essential if the price of Olympia's stock was to remain artifically high, which was Olympia's goal. Olympia's selfish motive for wanting the venture to succeed does not obscure that Olympia did want it to succeed and took measures to further its success.

For the foregoing reasons, I conclude that the jury could have reasonably found that Olympia aided and abetted the fraud perpetrated by Loeb Rhoades and Bernhardt.

II. Plaintiff's Motion for an Award of Prejudgment Interest

At trial, the parties agreed that the question of prejudgment interest would be decided by the Court. Plaintiff has now moved for such an award, and has suggested two rates of interest and a method for calculating accrual. Defendant opposes the motion and has provided, in the alternative, an alternative method of calculation.

Because this is a federal securities case, federal law governs the availability and rate of prejudgment interest. *See Mallis, supra*, 717 F.2d at 692. The decision whether to award such interest is within the discretion of the Court. *Chris-Craft Industries, Inc. v. Piper Aircraft Co.*, 516 F.2d 172, 191 (2d Cir. 1975), *rev'd in part on other grounds*, 430 U.S. 1 (1977). The purpose of the award is to compensate the plaintiff. *See id.*

At trial, plaintiff introduced evidence of his financial losses, calculated on a first-in first-out purchase of stock basis. Ex. 141-42. These exhibits broke down chronologically plaintiff's expenses and receipts from purchases and sales of Olympia stock. From January 1, 1977 to February 28, 1977, plaintiff posted a net profit of $9662. From March 1 to March 14, plaintiff spent $1,987,653 more than he received. From March 25 to March 31, plaintiff spent $143,514 more than he received. For April 1977, expenses exceeded receipts by $71,483. During May, receipts exceeded expenses by $140,009. In June expenses exceeded receipts

by $143,188. For August through December, receipts exceeded expenses by $2560. On January 1, 1978 plaintiff held 59,393 shares of Olympia stock. From May 1978 through December 1980, plaintiff sold these shares for a sum of $839,031.50. Based on these calculations, the total loss incurred by plaintiff was $1,354,592.50, which is the amount of damages that the jury found plaintiff had sustained. The jury thus implicitly accepted plaintiff's argument that, even when the manipulation of Olympia's stock was revealed after March 15, 1977, plaintiff attempted to mitigate his losses by not "dumping" his stock on the market, an action that allegedly would have further depressed its price. The Court thus will disregard defendant's argument that an award of prejudgment interest for stock sold after December 1977 would compensate plaintiff for undue delay in selling the stock. Such an argument should have been made as part of a motion to reduce damages, since it suggests that the jury incorreclty found that plaintiff properly took more than three years to sell Olympia stock and re-invest the proceeds.

Having examined the entire record, I conclude that plaintiff should be awarded prejudgment interest, as compensation for losses sustained in connection with transactions in Olympia stock.

In calculating the rate of interest, I have considered several factors. First, plaintiff was a market maker, a person who dealt in high-volume trading of securities and attempted to obtain a profit from small fluctuations in the price of securities. Although not a traditional investor as such, he was entitled to believe that the price of the stock in which he dealt was not artificially high. Second, defendant did not have the use of plaintiff's money at any time and did not derive financial profit from its behavior. Third, plaintiff was not dilatory in commencing this action once he had reason to believe that defendant had defrauded him.

Plaintiff has suggested to the Court two different rates of interest: the prime rate and the money market rate. Defendant has suggested the New York State legal rate of interst, 9%. *See* N.Y.C.P.L.R. § 5004 (McKinney Supp. 1988). After considering

these suggestions, the Court concludes that the money market rate most accurately reflects the earnings lost by plaintiff due to defendant's fraud. Accordingly, the Court will employ that rate.

Apparently not content to differ regarding the facts and law of this case, the parties have submittted different methods of calculating an interest award based on money market rates. After reviewing both, I conclude that the method submitted by defendant, which is calculated based on an average annual yield beginning in 1977, is superior to that of plaintiff, which attempts to average such yields. Accordingly, defendant will be ordered to pay to plaintiff prejudgment interest pursuant to defendant's calculations submitted to the Court.

CONCLUSION

For the foregoing reasons, it is hereby ORDERED that:

(1) defendant's motion for a directed verdict and for judgment notwithstanding the verdict is denied; and

(2) plaintiff's cross-motion for an award of prejudgment interest is granted in part. Damages shall consist of the following – (a) $1,354,592.50 in actual damages, (b) prejudgment interest at the money market rate calculated by the method provided in the money-market schedule submitted by defendant, and (c) interest from the date of judgment calculated pursuant to 28 U.S.C. § 1961.

SO ORDERED.

Dated: Brooklyn, New York
January 27, 1988

/s/ Joseph M. McLaughlin, U.S.D.J.
JOSEPH M. McLAUGHLIN, U.S.D.J.

The Clerk shall make copies of this Order and shall serve them upon the parties.

STATUTORY ADDENDUM

Section 10(b) provides in pertinent part:

"It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national exchange. . .

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange, or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may proscribe as necessary or appropriate in the public interest or for the protection of investors." 15 U.S.C., 78j (1982).

Rule 10b-5 provides in pertinent part:

"It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,"

(a) To employ any device, scheme or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading. . . in connection with the purchase or sale of any security." 17 C.F.R. § 240.10b-5 (1986).